

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
WESTERN SECTION

Lisa Koss )  
 ) 12cv30170-MGM  
vs )  
 )  
Palmer Water Department No. 1 )  
Palmer Fire District No. 1 )  
\_\_\_\_\_ )

**Transcript of conference** Held Before  
The Honorable Mark G. Mastroianni,  
United States District Court Judge,  
on **April 13, 2015.**

APPEARANCES:

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1       **(Court commenced at 2:07.)**

2               THE CLERK: Be seated. Judge, the matter before  
3 the Court is Koss versus Palmer Water Department, Civil  
4 Action 12-30170.

5               Can counsel please identify themselves for the  
6 record?

7               MR. SHEA: Good afternoon. Michael Shea for the  
8 plaintiff.

9               MR. O'CONNELL: Daniel O'Connell for the  
10 plaintiff.

11              MS. SCHRENGOHST: Karina Schrengohst for the  
12 defendant, Your Honor.

13              MR. ARONSON: Robert Aronson for the  
14 defendant.

15              THE COURT: All right. Good to see you all. We  
16 have two motions. I don't know if there's more that I  
17 don't see here. The first motion is the plaintiff's  
18 motion in limine regarding number of employees and the  
19 defendants' motion in limine to exclude testimony and  
20 opposition filed by both parties. All right.

21              So on plaintiff's motion, regarding number of  
22 employees I'll hear you.

23              MR. SHEA: Yes, Your Honor. First of all, in  
24 the pretrial memo, Your Honor, there's a section that asks  
25 whether there are -- essentially asks whether there are

1 any amendments requested in this case.

2 As the Court may recall, we did file a motion to  
3 amend, and I think we asked for reconsideration on that  
4 motion to amend to add the state law claims on the number  
5 of employees in the event that the jury found that there  
6 were less than the requisite number for each statute and  
7 so we put none.

8 I didn't want to upset the Court by renewing it  
9 again, but I just wanted to renew it verbally again if for  
10 no other reason to preserve the record on appeal.  
11 Frankly, I think the case law talks about even motions at  
12 trial that can form motions to amend to add claims that  
13 conform to the evidence are allowed as long as there's no  
14 prejudice.

15 So having said that, Your Honor --

16 THE COURT: I recall the motion. However, I was  
17 not -- without being put on notice by a written pleading,  
18 I didn't read the ruling to review that issue so I'm not  
19 going to accept your renewing it verbally.

20 If you have a good faith reason to file another  
21 reconsideration, then file it. If there's something that  
22 merits the reconsideration in my mind, I'll give it to  
23 you, but I'm not going to just let you verbally come in  
24 and renew it that way. So consider your options. If you  
25 want to file something, you can file something. I'll deal

1 with it accordingly and that way the opposing side will be  
2 on notice as well.

3 MR. SHEA: Okay. That may go a long way, Your  
4 Honor, if that state law claim came in the alternative, it  
5 may go a long way to just ease the allowance of the jury  
6 to decide --

7 THE COURT: Right now we are going to assume  
8 that it's not. That's where we stand.

9 MR. SHEA: I understand. So we filed this  
10 motion to sort of cut to the chase here on what we  
11 perceived as obvious and that is that the Fire District  
12 and Water Department are really one. They're combined by  
13 statute, Your Honor. As you may recall, we pointed that  
14 out in our previous motion to amend.

15 THE COURT: Chapter 142.

16 MR. SHEA: I believe so, Your Honor.

17 THE COURT: Yes. All right.

18 MR. SHEA: And so the Court can take judicial  
19 notice of the fact that they're legally statutorily one  
20 entity, and with the two entities I don't think there's  
21 any dispute that the number of employees on the roster is  
22 46 and so that well exceeds the 15 for Title VII and six  
23 for 151B, the state law claim.

24 THE COURT: You're saying there's no dispute  
25 that the total is, what did you say 46?

1 MR. SHEA: Right.

2 THE COURT: But there's no dispute?

3 MR. SHEA: I don't think there's any dispute if  
4 you look at both --

5 THE COURT: Looking at both, right.

6 MR. SHEA: And both are combined by statute,  
7 Your Honor, and there's just very compelling evidence that  
8 they in fact are combined. They're statutorily combined;  
9 they're in fact combined because the correspondence in the  
10 letterhead, the handbook, they're in the same building.  
11 The public notices that went out combined them.

12 THE COURT: Well, even if I were to entertain  
13 your request to take judicial notice that they're combined  
14 under statute, the number of employees would be  
15 essentially an element of your claim, wouldn't it?

16 MR. SHEA: But if you take judicial notice of  
17 the fact that they are combined, I don't think there's any  
18 dispute that we well exceed the numbers for both statutes.

19 THE COURT: Judicial notice would be combined  
20 for the sake of type and how you would refer to them, but  
21 even under your scenario if I took judicial notice, I'm  
22 not sure I could take judicial notice of something that  
23 would relieve you of establishing one of the elements of  
24 your claim.

25 MR. SHEA: If you took judicial notice, Your

1 Honor, of that statute and the fact that they're combined,  
2 then the evidence that would go in would be very simple.  
3 It would be --

4 THE COURT: That's true.

5 MR. SHEA: -- both are combined and there are 46  
6 employees.

7 THE COURT: Sure.

8 MR. SHEA: That would be easy.

9 THE COURT: Under your version, yes, I can see  
10 that. Okay.

11 MR. SHEA: Right. So it would avoid this whole  
12 mini trial and all this testimony and documents on the  
13 subject of number of employees when they're obviously  
14 combined. That's our simple argument.

15 THE COURT: Okay. On that issue I will hear  
16 you.

17 MS. SCHRENGOYST: Thank you, Your Honor.

18 There's clearly a dispute about whether or not these  
19 two, Palmer Water and Palmer Fire, are combined. They are  
20 two very different functions. They employ different  
21 staff. Unlike what was stated in the motion, they don't  
22 share a budget. There are a number of distinctions  
23 between the two, and so judicial notice under these  
24 circumstances is not appropriate to relieve them as you  
25 said of this essential element of their claim.

1           THE COURT: So if there were those issues,  
2 absolutely, judicial notice wouldn't be the appropriate  
3 consideration. How do you deal with the statute?

4           MS. SCHRENGOHST: Your Honor, I can understand  
5 and appreciate the position of the plaintiff, but there  
6 are a lot of other factors in determining whether or not  
7 there are joint employers.

8           These two businesses function completely separate and  
9 apart from one other. The Fire Department and the Water  
10 Department are on the same property but they're not the  
11 same building. They're in different locations.

12           The most important part of determining whether or not  
13 someone is a joint employer is whether or not they share  
14 control over employment decisions. The Fire Department  
15 shares absolutely no control over hiring decisions, firing  
16 decisions, discipline related to the Water Department.

17           THE COURT: Do you think the statute that we're  
18 referring to essentially establishes and names them as  
19 one?

20           MS. SCHRENGOHST: I don't think that that's  
21 enough, no.

22           THE COURT: But do you agree that's what the  
23 statute does, it establishes them as one entity?

24           MS. SCHRENGOHST: Yes.

25           THE COURT: All right. So for what purpose did

1 the statute establish them as one entity?

2 MS. SCHRENGOHST: Well the primary purpose of  
3 this statute is, as we mentioned, related to the budget.  
4 They can't share revenue. As the statute states here that  
5 money that comes in for the Fire Department is money that  
6 comes in from taxes, and money that comes in for the Water  
7 Department is money from the sale of water and that these  
8 two can't share revenue.

9 THE COURT: So your argument is the statute  
10 created them as one entity for a limited purpose, which  
11 leaves them open to be considered separate entities for  
12 other purposes?

13 MS. SCHRENGOHST: I think that there are a lot  
14 of other factors that are important other than just the  
15 name of the entity that goes into determining this when  
16 you have two businesses that are functioning very separate  
17 from one another.

18 THE COURT: Absolutely. That may be entirely  
19 true, but it's not often where you have in an employment  
20 case a business that someone says you operate as one but  
21 there's a statute created that actually addresses that.  
22 Here we have a statute created. It puts your argument in  
23 a difficult light, quite frankly.

24 Can you point me to any authority, statutory history,  
25 that talks about the distinction that puts it into context

1 that they're talking about, either the statute made them  
2 one entity for a limited purpose and that would leave  
3 still some room for you to make the argument that for  
4 other purposes you can consider them two? Do you have  
5 anything?

6 MS. SCHRENGOHST: No, Your Honor, not off the  
7 top of my head. I do not.

8 This is a very unique situation, but I think as I  
9 mentioned earlier that the primary consideration in  
10 determining whether or not you have joint employers is  
11 listed in our opposition, and that Romano v. U-Haul Intern  
12 talks about the different factors that you need to  
13 consider, common management, and that the primary thing to  
14 consider is the day-to-day control over employment  
15 decisions.

16 THE COURT: I don't dispute that those  
17 considerations are very important, but as I noted  
18 generally in the employment type of context of an  
19 employment-related case we don't have a statute jumping in  
20 and saying, all right, we're passing the statute that says  
21 you are one entity. That's the difference here.

22 I'm happy to look at something that you say doesn't  
23 have that effect, but if I'm considering judicial notice,  
24 that is obviously a very primary important consideration,  
25 judicial notice is a statutory declaration. All right.

1 Thank you.

2 Did you want to say anything in response?

3 MR. SHEA: Your Honor, just it seems quite  
4 obvious that right, there's a statute that clearly  
5 combines them. It doesn't make any exceptions.

6 It sort of reminds me of the statute that allows you  
7 to form a corporation. So if a corporation is sued like  
8 Home Depot that has a couple different locations in  
9 different departments, that is by statute one entity, Home  
10 Depot, Inc. U.S.A., whatever, and so to argue that one  
11 store is different from the other, it just doesn't work.

12 I mean, you can argue that they're separate but by  
13 law they're combined, and I think we're just going to go  
14 off on a mini trial on accounting records and testimony in  
15 that regard, Your Honor, that is unnecessary.

16 MS. SCHRENGOHST: Your Honor, if I could just  
17 also add that the court has already held that this issue  
18 is a question of fact and because of this it's better left  
19 for the jury to hear this evidence and come to their own  
20 determination about whether or not these are joint  
21 employers taking into consideration the statute and all of  
22 these other factors as well.

23 THE COURT: How did the court find that it's a  
24 issue of fact?

25 MS. SCHRENGOHST: In the order and memo on

1 summary judgment dated October 15th, "The court considers  
2 the question of whether Palmer Fire and Water constitutes  
3 an employer under the statute to be a genuine issue of  
4 material fact." Because determining whether or not an  
5 entity is an employer, it still have to establish that  
6 there are enough employees and the only thing that's been  
7 put forward to establish that is a list that was generated  
8 without any kind of supporting documentation by  
9 Ms. Koss.

10 THE COURT: Well, in the prior -- in my prior  
11 ruling you filed a motion for summary judgment and you  
12 asserted, you asserted that the Court find that the name  
13 of the entity is not an issue of material fact in support  
14 of your summary judgment request, correct?

15 MS. SCHRENGOHST: Your Honor, it was not that  
16 narrow. It was about the name of the entity. That's  
17 precisely this issue that we're discussing right now.

18 THE COURT: Well, the use of the term material  
19 fact in the summary judgment motion was directly linked to  
20 the standard applicable at a summary judgment hearing.

21 I think you stretch it until it breaks when you say I  
22 therefore found that it's a material fact in the case in  
23 general. When I applied the summary judgment standard,  
24 that's the language that you're citing, the language that  
25 was specifically used in a summary judgment determination

1 about finding whether or not there was a material -- a  
2 material fact or not for purposes of applying the summary  
3 judgment standard.

4 I don't see how you raise that saying that the Court  
5 made a finding already to support your position. I think  
6 that's almost a blanket misconstruing of what the prior  
7 ruling was.

8 MR. SHEA: Your Honor, can I add that subsequent  
9 to that ruling is when we filed our motion for  
10 reconsideration on the motion to amend and Your Honor made  
11 a comment in that ruling saying essentially that, I'm  
12 paraphrasing because I don't have it in front of me, but  
13 essentially saying that it's extremely compelling that  
14 there's a statute combining these two departments as one,  
15 as one entity, or words to that effect, and your language  
16 was pretty strong in that regard, Your Honor. And that's  
17 I think part of the reason you hesitated on the motion to  
18 amend is if the evidence is so compelling, that there  
19 wouldn't be a need to do so. I'm sort of reading between  
20 the lines but that's how I took your ruling on that  
21 motion.

22 THE COURT: All right. Here's what I'm going to  
23 do on the plaintiff's motion in limine regarding the name  
24 or whether or not there's one or two entities, on the  
25 issue of whether or not the Court will take judicial

1 notice as to whether or not they're one or two entities,  
2 I'm not getting into whether or not I'm going to take  
3 judicial notice of the number of employees, I'm not, but I  
4 am going to take judicial notice that it is one entity  
5 under the statute, the statute that I've referenced.

6 I will allow the defendant to file a reconsideration  
7 within seven days if you can in good faith support it with  
8 case law that we talked about that exists, is there some  
9 history, is there some basis for you saying the statute  
10 created it for a limited -- it created one entity for a  
11 limited purpose.

12 If you can't, if in good faith you can't find one,  
13 you can't find one. But it seems to me pretty clear right  
14 now in looking at that statute that I can, and I'm  
15 convinced that I should, take judicial notice that it's  
16 one entity under that statute. So you have seven days to  
17 file a reconsideration if you can point to some case law,  
18 some history, et cetera. Of course, you will be able to  
19 respond.

20 Now as to the number of employees, I'm not going to  
21 carry over and take judicial notice about the number of  
22 employees because that's getting -- let's assume nothing  
23 is filed to have me reconsider it and we go forward on  
24 judicial notice. Nonetheless, you do have -- it's an  
25 element of your case and I'm not going to relieve you of

1 that.

2 So granted how you prove that with judicial notice,  
3 you'll make some choices about how you prove it as opposed  
4 to the choice you would make if there weren't judicial  
5 notice, but I'm not specifically going to take judicial  
6 notice of a particular number of employees.

7 MR. O'CONNELL: Your Honor, I don't mean to  
8 interrupt because this has nothing to do with the motion  
9 but I'm going to be trying the case and my only procedural  
10 question is my understanding is that when a court does  
11 take judicial notice, a lot of times I see it in auto tort  
12 cases in a right of way or this is a one-way street and  
13 with judicial notice the court would advise the jury that  
14 there's no need to concern yourself with this because the  
15 court has taken judicial notice that it's a one-way street  
16 going in an easterly direction. Will the Court --

17 THE COURT: I would if your -- so to use your  
18 hypothetical, I plan on telling the jury that this is a  
19 one-way street. I'm not going to tell them that the  
20 one-way street is 35 feet in width with a certain number  
21 of lanes.

22 I will tell them that I'm taking judicial notice of  
23 the fact that it's one entity and the name is... It's one  
24 entity and that would be it. I'm not going to tell them  
25 how many employees there are.

1 MR. O'CONNELL: That's all I wanted. Thank you.

2 MR. ARONSON: Your Honor, just to pursue this  
3 little bit further.

4 THE COURT: Yes.

5 MR. ARONSON: I understand what you're saying  
6 about the statute, but it's unclear to me as to whether or  
7 not you're going to permit the defendants to argue that  
8 Palmer Water Department and the Palmer Fire District have  
9 separate functions and have separate managements and have  
10 separate employees and how they interrelate; is that  
11 something we are still going to be able to offer evidence  
12 on?

13 THE COURT: And it would go -- that would go to  
14 what?

15 MR. ARONSON: The issue of interrelationship.

16 THE COURT: Go to the number of what, number of  
17 employees?

18 MR. ARONSON: Ultimately it would because the  
19 predicate for finding the number of employees of Palmer  
20 Fire District being employees of Palmer Water is dependant  
21 upon the extent of the interrelationship between those two  
22 entities. And even though they may have the same name,  
23 it's our position they have separate functions. It's our  
24 position they have separate budgets, that neither had  
25 employment decision-making authority over the other, and,

1       therefore, it's our conclusion and our position that the  
2       interrelationship is not sufficient for purposes of Title  
3       VII or Section 151B to call it the same entity.

4             It's more than the issue of what their name is. It's  
5       much more in terms of what their operation is, and that's  
6       why I asked the question whether we would be foreclosed  
7       from showing the separate nature of these entities.

8             THE COURT: You would not be foreclosed if it  
9       goes to the limited issue of how many people you employ,  
10      but if it's going to the larger picture of the judicial  
11      notice is incorrect and you're going to be asking the jury  
12      to find the opposite of the judicial notice, essentially  
13      your argument just told me that's what you would be doing,  
14      I think I would not allow you to do that.

15            MR. ARONSON: That is not what we would be  
16      arguing. We would not be arguing judicial notice. We  
17      concede that they are the same. They're unified for  
18      purposes of their name, but it's our position that that  
19      isn't enough to make the Palmer Fire District employees  
20      essentially Palmer Water District employees.

21            You have to also look at the actual functioning of  
22      these two entities which do operate independently and  
23      separately, and I think the jury should be able to or  
24      should be entitled to and I believe it's a jury question  
25      and the cases hold, and so that's why we intend to present

1 evidence about the separate functions, the separate  
2 budgets.

3       There's a separation between these two companies, and  
4 it may fly in the face of somebody concluding that they  
5 have the same one name, and so I'm not clear on your  
6 ruling. But I think that in fairness the defendant should  
7 be able to show these are not, regardless of whether  
8 statutorily they have a unified name, they are  
9 nevertheless an operation of two separate entities and  
10 therefore their employees can't be intermixed.

11       It's a question of the interrelationship between  
12 them. We wouldn't be saying that the name is not Palmer  
13 Water and Fire -- Palmer Water and Palmer Fire Department  
14 District No. 1. We wouldn't challenge that based on your  
15 judicial notice.

16       THE COURT: But I have to assume the legislature  
17 didn't have a statute passed to just name -- to make them  
18 one entity --

19       MR. ARONSON: Well...

20       THE COURT: -- because the legislature had  
21 nothing else to do.

22       MR. SHEA: And, Your Honor, I think the cases  
23 that cite on that subject where it's a question of fact  
24 for the jury don't involve a clear statute that combines  
25 these two departments.

1           MR. ARONSON: It doesn't really say it. If you  
2 look carefully, I'm assume you're referring to Chapter  
3 142, it just says they're changing, our reading it  
4 quickly. It doesn't say that they are a unified entity  
5 number one.

6           It merely says we're changing the title from "An act  
7 further regulating Palmer Fire District No. 1 of Palmer,"  
8 changing the last two words "of Palmer" and saying An act  
9 further regulating Palmer Fire District No. 1 and it now  
10 becomes the Palmer Water District No. 1. It doesn't say  
11 they're combined. All it says is that's what we're going  
12 to refer to, and they're regulating them. One of the  
13 regulations is no monies collected --

14           THE COURT: You just argued completely,  
15 completely and opposed a concession your co-counsel made  
16 regarding the question I had asked her. I asked  
17 specifically, do you agree that the statute refers to them  
18 combined and makes them one entity?

19           MR. ARONSON: Well...

20           THE COURT: I thought the answer in good -- I  
21 mean, maybe I understood.

22           MR. ARONSON: I don't mean to dispute what my  
23 co-counsel said. All I'm saying is a more careful reading  
24 of this, maybe there was --

25           THE COURT: If you can make a more careful

1 reading of this, then I suggest it should be in a pleading  
2 with something that I could refer to. So you have seven  
3 days if you're going to file for reconsideration.

4 I'll take up another issue as to how far we can go to  
5 work within this ruling after I determine -- you may have  
6 a valid reconsideration if you can support it. I will  
7 take up the issue about how far we can go or can't go  
8 after I see if we're going to have a reconsideration of  
9 the ruling.

10 MR. ARONSON: Thank you very much, Your Honor.

11 THE COURT: Thank you. Understand where we are?

12 MR. ARONSON: Yes.

13 THE COURT: Okay. All right. The defendants'  
14 motion in limine regarding the exclusion of testimony.

15 MS. SCHRENGOYST: Thank you, Your Honor. After  
16 Ms. Koss reported alleged harassment to Palmer Water,  
17 Attorney Henry Rigali conducted an investigation into her  
18 allegations.

19 At the conclusion of that investigation he submitted  
20 a letter to the board of Washington D.C. Commissioners  
21 summarizing his interviews and his findings and the legal  
22 issues performed and some recommendations.

23 The evidence that plaintiff is seeking to get from  
24 Attorney Royal and myself is easily obtained through  
25 Attorney Rigali. Neither Attorney Royal or myself

1 interviewed any people; neither of us met with anyone;  
2 neither of us was present during any of these meetings in  
3 the course of Attorney Rigali's investigation.

4 Attorney Rigali testified to our involvement in the  
5 investigation. He testified that we provided generic  
6 information, guidance.

7 Attorney Rigali has been practicing since 1974 I  
8 believe, and the suggestion that plaintiff is making is  
9 that somehow Attorney Royal and I were overbearing in this  
10 investigation. Where Henry Rigali has testified that he  
11 took some guidance from us but we weren't present. We  
12 weren't involved in the investigation to the extent that  
13 they're suggesting, and in fact Attorney Royal never had  
14 any communication with Attorney Rigali. She neither had  
15 any communications with the defendants related to the  
16 investigation.

17 THE COURT: So Judge Neiman in his order  
18 indicates the documents reflected ongoing active  
19 participation in the investigation on the part of the  
20 attorneys at Royal LLP, like guidance, advice, direction.

21 MS. SCHRENGOHOST: Yes, Your Honor. This was  
22 prior to Attorney Rigali's deposition when he had an  
23 opportunity to review these documents with Attorney Shea  
24 and Attorney O'Connell.

25 THE COURT: Well, in looking at this Judge

1 Neiman made clear findings regarding a fervor defense and  
2 once that's raised, that opens up discovery issues for the  
3 plaintiff being able to get those materials. So you're  
4 not disputing that, right? That's accepted as the state  
5 of law; is that your position?

6 MS. SCHRENGOYST: Yes, Your Honor.

7 THE COURT: Now, I do agree with you that courts  
8 generally disfavor this type of situation as being created  
9 where you, I mean the attorney for the defendant, is being  
10 put in a situation where there's a potential conflict or  
11 there's withdrawal issues, especially if there is  
12 alternative means of getting that evidence.

13 You may argue the evidence is inadmissible under the  
14 rules of evidence for a variety of reasons, but to start  
15 with before that's going to be considered I think I'd like  
16 to examine the need.

17 What's the need, plaintiff, for counsel to be called  
18 as a witness as opposed to what you have available for  
19 documents? Obviously Attorney Rigali is available, right?

20 MR. SHEA: Because it's very compelling in this  
21 case, Your Honor. In this case there is ample evidence  
22 through those documents, e-mails, pre-drafts of the  
23 conclusions of the investigation that the lawyers at the  
24 Royal LLP law firm influenced this investigation in our  
25 view improperly and directed it improperly because it was

1 supposed to be an impartial investigation and it wasn't  
2 from the outset, Your Honor.

3 The e-mails, I don't think it's -- really I don't  
4 believe that it's fair to our client, Your Honor, that  
5 these e-mails go in without the testimony behind them, and  
6 these e-mails are very compelling.

7 There are several e-mails and Judge Neiman looked at  
8 many of them and concluded that something is wrong when  
9 the defense firm is directing and influencing the  
10 investigation from the outset.

11 Quite frankly, Your Honor, I was deposed in this  
12 case, and I'm expected to be called as a witness.  
13 Attorney O'Connell is here to try the case with me and  
14 part of the reason he's here is because I'm going to  
15 testify in the case.

16 I'm a little surprised but Attorney Schrengohst was  
17 deposed in this case related to this issue and some of her  
18 testimony was very compelling in this case, Your Honor, on  
19 what was done and what shouldn't have been done in terms  
20 of a proper and appropriate investigation. So to say that  
21 they now can't be called as a witness is just not right in  
22 this case.

23 THE COURT: Well, other courts have reviewed  
24 this and I think both the state and federal authority that  
25 has reviewed it have looked for, you know -- again I'm not

1 saying you don't have the right to put on this type of  
2 evidence but that alternatives to that should be explored.

3 Why wouldn't the introduction of documents and  
4 Attorney Rigali, I'm not getting your argument as to why  
5 that's not enough? Why that wouldn't -- I wouldn't  
6 deprive you of showing anything that you want to show.

7 MR. SHEA: Well, it's not just Attorney Rigali's  
8 e-mails, Your Honor. It's not just what he did or didn't  
9 do. It's leaving out the whole aspect that he was  
10 supposed to be the independent and impartial investigator.

11 THE COURT: E-mails that Attorney Rigali  
12 reviewed somehow wouldn't be admissible without -- why  
13 wouldn't they?

14 MR. SHEA: They certainly could be admissible,  
15 Your Honor, but you don't have the testimony from the  
16 people who are sending them and why they sent them. All  
17 you're seeing is a blank e-mail with Attorney Rigali's I  
18 guess testimony on the witness stand I received this  
19 e-mail.

20 Again the perfect example of what I'm talking about  
21 outside the documents is we deposed Attorney Schrengohst  
22 and Attorney Schrengohst's testimony is key and important  
23 in this case, as is Attorney Royal's testimony in this  
24 case, because it shows how they influenced Attorney  
25 Rigali.

1           So if Attorney Rigali gets on the stand and he says I  
2 did a fair and impartial investigation and you see the  
3 e-mails going back and forth, it's not just the e-mails.  
4 It's what the defense firm did or didn't do in this case  
5 that was inappropriate and it's very compelling, Your  
6 Honor.

7           THE COURT: Well, that's a strong statement. I  
8 mean, you're not saying information they have is relevant  
9 on a certain issue. You're saying that what they did was  
10 inappropriate?

11           MR. SHEA: Well, yes. I'll give you an example,  
12 Your Honor. I went to a meeting with my client --  
13 Attorney Rigali called a meeting with me and my client to  
14 investigate the allegations. It was part of this  
15 investigation.

16           Nobody mentioned the fact that the law firm of Royal  
17 LLP was behind the scenes and involved in this  
18 investigation. I never would have produced my client at  
19 such a meeting frankly. It's kind of like a defense firm  
20 asking to meet with my client and portraying them as an  
21 independent investigator.

22           In any event, Attorney Rigali, who had no experience  
23 in investigating sexual harassment complaints, then sought  
24 the advice of the law firm on how to write his report,  
25 sending drafts to the law firm to review, and that is very

1 compelling, Your Honor.

2 I'll give you an example, if I might. Here's an  
3 e-mail from Attorney Schrengohst to Henry Rigali during  
4 the investigation. It says, "First, we need to wrap up  
5 the investigation" -- this is from Attorney Schrengohst to  
6 Attorney Rigali, Your Honor. "We need to wrap up the  
7 investigation regarding Ms. Koss's allegations as soon as  
8 possible, which will involve meeting with each board  
9 member. Please let me know if there's anything I can do  
10 to help facilitate this."

11 "As we are very familiar with Attorney Shea's  
12 tactics, it is super important that we are able to defeat  
13 his argument with evidence that we promptly investigated  
14 Ms. Koss's allegations."

15 "Although our preference is to have you investigate  
16 because Ms. Koss's allegations include the board  
17 generally, we could, as an alternative, have Mike  
18 investigate if necessary." Mike is on the board of the  
19 water department.

20 "Also, after the meeting I spoke with Amy and she  
21 mentioned sending a response to Attorney Shea's letter. I  
22 did not see anything in the file so I wanted to follow up  
23 with you and find out if you had responded to Attorney  
24 Shea. If not, I'm happy to draft something. The purpose  
25 of our response is really to pin them to this story and

1       these allegations as a complete account."

2               That was on April 11th and that was before I was  
3       called in to what appeared to be an impartial  
4       investigation by Attorney Rigali.

5               THE COURT:   What do you say about the suggestion  
6       by Attorney Schrengohst regarding doing a voir dire of the  
7       testimony to determine that -- why wouldn't that be --  
8       that sounds like actually a pretty good suggestion as to  
9       what might be helpful to the Court in making this  
10      decision.   I mean, I'm sure you sensing I'm very hesitant.  
11      I'm appreciating the role of trial counsel historically --

12              MR. SHEA:   I can understand that, Your Honor.

13              THE COURT:   -- to be put in a situation of  
14      telling trial counsel you're going to get called as a  
15      witness.   You're going to have to withdraw.   You have a  
16      conflict.

17              MR. SHEA:   I understand, Your Honor, but in this  
18      case, you know, you've got the Haddad v Wal-Mart case  
19      which talks about whitewashing investigations.   This is a  
20      whitewash investigation, and normally we would not even  
21      think of calling counsel as a witness.   I've never seen it  
22      before.

23              In this case there is so much compelling evidence and  
24      Judge Neiman endorsed that and found that the firm -- that  
25      the defense firm was -- in fact, he said at the hearing

1 you've got a real problem to Attorney Schrengohst because  
2 these e-mails and documents all came out essentially  
3 waiving the attorney-client privilege. So when that  
4 happens and they're so intimately involved and there is so  
5 much compelling evidence that this investigation was  
6 "influenced" arguably improperly and --

7 THE COURT: That's the difference. You're  
8 interjecting the word now influence. Influence puts the  
9 different -- if I believe it was influenced, that casts it  
10 in a different light than just as Attorney Schrengohst  
11 just said if they're providing information, guiding, more  
12 of a logistic administrative kind of keep it going, keep  
13 it on track, get it done. I don't want to be involved,  
14 just get this done for us. We can't do anything.

15 MR. SHEA: No, Your Honor.

16 THE COURT: That's one thing. That's very  
17 different than influence.

18 MR. SHEA: I completely understand that, Your  
19 Honor. But as I just read, for the investigator to be  
20 sending drafts to the law firm to review and revise and  
21 for the law firm to give them the report, the independent  
22 report template to draft, among other evidence, Your  
23 Honor, is just compelling.

24 THE COURT: Doesn't that also have to suggest  
25 that Attorney Rigali would also have to be acting -- I'm

1 hesitant to say this about attorneys doing their jobs in  
2 cases, but even for purposes of just hypothetically  
3 speaking now acting inappropriately as well in his  
4 independent review?

5 MR. SHEA: I think using the word  
6 inappropriately, Your Honor, or improperly might be a  
7 better word because it's not an independent investigation  
8 when a defense firm influences, unduly influences that  
9 investigation.

10 THE COURT: Do you assert that the independent  
11 investigator assigned in this case was knowingly not  
12 independent?

13 MR. SHEA: He's never done an investigation in a  
14 sexual harassment case, Your Honor. All I can tell you is  
15 it looked to me in all the e-mails, many, many e-mails, is  
16 that the law firm of the Royal LLP was directing him on  
17 what to do.

18 He was seeking -- he was asking what questions to  
19 ask. He was asking how to interview. He was being told  
20 as is evidenced by the e-mail I just read exactly how to  
21 skew this so that she is pinned down, that is not an  
22 impartial investigation, Your Honor. That's not a proper  
23 investigation. So to say it's inappropriate or improper I  
24 think is an understatement.

25 As far as the voir dire goes --

1 MR. O'CONNELL: Judge, we just want to make it  
2 real clear that we deposed Mr. Rigali. We don't think he  
3 did anything inappropriate. We just don't think he had  
4 any experience in this area, and what we're suggesting is  
5 the Royal firm directed him and at times instructed him on  
6 how to do it, yet it got to the point where how --

7 THE COURT: That helped. I get the distinction.

8 MR. O'CONNELL: He testified at deposition I've  
9 never done anything like this and so I didn't want the  
10 Court to think we were suggesting this.

11 When Mr. Shea says inappropriate, we are not  
12 suggesting there was anything unethical. We don't take it  
13 that way. We are simply saying that an employment  
14 investigation -- when an employment defense firm who  
15 specializes in defense is coordinating the investigation  
16 to the hire him and getting him to do it this way, we want  
17 you to pin them down on this, that's not a fair and  
18 impartial investigation.

19 In the Haddad v Wal-Mart case, a sham whitewash  
20 investigation is relevant as grounds for punitives, and we  
21 would bring the Court's attention to that case because it  
22 specifically talks about doing that.

23 THE COURT: Well, I don't disagree, I don't  
24 disagree with if -- I'm underscoring if -- if there was a  
25 sham investigation that that wouldn't be relevant at least

1 in my mind, and I have reviewed most of what Judge Neiman  
2 did and perhaps I need to take a closer look at what Judge  
3 Neiman found.

4 What do you say, Attorney Schrengohst?

5 MS. SCHRENGOHST: Your Honor, the plaintiff's  
6 counsel is stretching the limits of the involvement that  
7 Royal LLP had in this situation.

8 If you review some of the documents, you will see  
9 that they're very generic questions that were provided to  
10 Attorney Rigali, and Attorney Rigali testified that there  
11 was suggestions that he took and others that he didn't.

12 There's this suggestion that this is a very uncommon  
13 occurrence, but it's very common to consult behind the  
14 scenes with HR departments on a regular basis when a  
15 complaint is made internally to make sure that the right  
16 people are spoken to; that the investigation is done  
17 promptly; that all of the information and documents that  
18 need to be gathered are compiled.

19 I don't think that there's a way to suggest that one  
20 party was being improper or inappropriate without  
21 suggesting the other party was as well. Because if this  
22 was a shame whitewash investigation as they're suggesting,  
23 then our influence had to have impacted Attorney Rigali in  
24 this.

25 THE COURT: All right. As far as -- can you

1 explain a little more so we have a clear record why you  
2 think a voir dire might be or would be appropriate? I  
3 think it's a good suggestion.

4 When you address this, can you address the portion in  
5 your motion, I'm looking at it right now, that during a  
6 voir dire there still would be a protective order to  
7 preserve any attorney-client privilege that hadn't been  
8 waived. I don't know what attorney-client privilege in  
9 the context of a voir dire on that issue wouldn't have  
10 been waived.

11 MS. SCHRENGOHST: The protective order, Your  
12 Honor, more generally we're speaking that if you were to  
13 disagree with us and we were compelled to testify, that  
14 there be a limitation and an understanding in advance of  
15 what we're going to discuss so that counsel isn't  
16 objecting to testimony on the basis of attorney-client  
17 privilege.

18 THE COURT: So that protective order reference  
19 was let's go down that road and you just assumed you are  
20 ultimately called as a witness at trial.

21 MS. SCHRENGOHST: Exactly.

22 THE COURT: So we can deal with that if and when  
23 we need to.

24 MS. SCHRENGOHST: Yes. But as far as the voir  
25 dire goes, I believe that it will become very clear that

1 our involvement was not to the extent that's being  
2 suggested here.

3 As I mentioned, Attorney Royal didn't speak with  
4 Attorney Rigali regarding the investigation and didn't  
5 speak with any of the defendants related to the  
6 investigation. She was -- her deposition was scheduled  
7 but they never proceeded with it.

8 THE COURT: Ultimately have there been  
9 discussions with your client, whoever in the town or city  
10 administration that you would identify as being your  
11 client, regarding this potential issue regarding possible  
12 conflicts?

13 I'm just wondering if this goes to the extent -- I'm  
14 interested to hear from both parties on what type of voir  
15 dire I need to do with the party or representatives of who  
16 you are the attorney for because I need to preserve that  
17 wherever this case goes, whatever happens at trial, that  
18 that issue is addressed upfront and not left for depending  
19 on what the findings are and rulings, verdict, et cetera,  
20 an obvious appellate issue. That conflict issue, has  
21 there been any type of discussion?

22 MS. SCHRENGOHOST: We've had some conversation  
23 about that we have been identified as witnesses and then  
24 planned further discussions after the Court's ruling.

25 THE COURT: Do you think that is a potential

1 conflict if it turns into an actual conflict waivable?

2 MS. SCHRENGOYST: I don't think that there's  
3 going to be --

4 THE COURT: All right. So we don't have to know  
5 that now but that's an issue.

6 MS. SCHRENGOYST: Yes.

7 THE COURT: Maybe we don't have to cross that  
8 bridge but if we do, I would have to know if it's waivable  
9 or not. If it's not, that's one thing. If it is, that's  
10 another and that could affect the timing of this case  
11 ultimately. That's just food for thought I guess right  
12 now.

13 MR. O'CONNELL: Your Honor, if I can just  
14 briefly touch on that? Mr. Shea and I are happy to  
15 provide you with records provided -- that Mr. Rigali  
16 provided to Judge Neiman, but that was well in advance of  
17 a year and a half ago I believe when Judge Neiman ruled on  
18 the motion and that pushed back --

19 THE COURT: That was before Judge Neiman ruled,  
20 before or after Mr. Rigali's deposition?

21 MR. O'CONNELL: No. Judge Neiman ruled well  
22 before Mr. Rigali's deposition, yes.

23 THE COURT: That's what I thought.

24 MR. O'CONNELL: Judge Neiman from this -- I  
25 believe we were in this courtroom.

1 THE COURT: Who let him use this courtroom?

2 MR. O'CONNELL: Well, it's a nice courtroom,  
3 Your Honor, but he looked at Ms. Schrengohst and said you  
4 have a real problem here and he says your attorney-client  
5 privilege may be waived, and with all due respect --

6 THE COURT: But, really, I would understand that  
7 comment regarding that. When that type of defense is  
8 raised and there was an investigation, I think he was just  
9 stating what the law is. Under those circumstances the  
10 attorney-client privilege is waived and that in and of  
11 itself could be considered a problem. I think you're  
12 asking me to read too far into that.

13 MR. O'CONNELL: Well, he had these records.  
14 They were *in camera* reviewed by him delivered  
15 confidentially for his eyes only. We hadn't even seen  
16 them yet and he came out and said you've got a real  
17 problem. Not only it looked like you were involved, you  
18 were directing it.

19 Mr. Shea and I assumed they were going to withdraw  
20 and get out. There's a clear conflict. They don't see  
21 it. I'll tell them in open court, there's a clear  
22 conflict, and because they stayed in they now want to voir  
23 dire and they want to say we're going to object to this,  
24 but these records have been turned over by Henry Rigali  
25 pursuant to a subpoena. He came in and gave us these

1 records. We are in possession of it.

2 The toothpaste is out of the tube and now they want  
3 to sit and say, well, we may not answer all these  
4 questions. We may raise privileges. I don't think they  
5 have the privilege during this time period to waive.

6 THE COURT: Attorney Schrengohst, do you -- what  
7 do you say about Judge Neiman? It's very hard when you're  
8 put in these situations where a litigant is saying the  
9 magistrate judge said this or the magistrate judge acted  
10 like that and, oh, boy, you should have seen the look on  
11 the magistrate judge's face when he said that, that's  
12 almost what I feel like where I'm going.

13 I mean, I did look at Judge Neiman's things. I know  
14 he made comments about your involvement. I think the  
15 comments could have been clearly in the context of how you  
16 said it, but I also think Judge Neiman's comments about  
17 you have a real problem could have been relative to when  
18 that defense is raised there is a problem with  
19 attorney-client privilege, which is a problem, but that's  
20 an entirely different problem than what you're talking  
21 about now.

22 MS. SCHRENGOHST: Your Honor, that was not my  
23 interpretation at the time in any way that the judge was  
24 saying you have a real problem.

25 THE COURT: As far as inappropriate influence.

1 MS. SCHRENGOHST: Exactly. It was you have a  
2 real problem as I've reviewed these documents, you put  
3 forward this defense.

4 THE COURT: You're going to have to turn them  
5 over.

6 MS. SCHRENGOHST: Turn them over, yes.

7 THE COURT: Those are two very different  
8 interpretations of what Judge Neiman could have been  
9 intending.

10 MS. SCHRENGOHST: Yes.

11 MR. O'CONNELL: The judge stated, "There was an  
12 ongoing an active participation in the investigation."  
13 Remember, a fair and impartial investigation under the  
14 MCAD guidelines. "There was an ongoing active  
15 participation in the investigation on the part of  
16 attorneys at Royal LLP in the form of guidance, advice,  
17 and direction to Henry Rigali," the individual charged by  
18 defendants to investigate. That's serious because they're  
19 not talking general counsel. You're talking defense  
20 counsel outside privately retained.

21 THE COURT: I understand what you're saying.  
22 I'm not sure that rises to the level of influence. I'm  
23 not sure that's a fair way to characterize what Judge  
24 Neiman said.

25 I'm not saying I'm pre-deciding your issue. I'm just

1 saying I think for me, for me to make a conscientiously  
2 informed ruling I'm going to need a voir dire. What would  
3 be wrong with doing a voir dire on this? How would you be  
4 harmed by that?

5 MR. O'CONNELL: I think if it was a voir dire of  
6 just a witness, it would be one thing. But when it's  
7 trial counsel who is now seeing the cross and I'm showing  
8 all my head to them, this is not a witness who's going to  
9 testify and go out and then come back in and testify under  
10 oath. This is trial counsel, and it's almost -- I didn't  
11 create this situation. I hate it.

12 When I was brought into this case by Mr. Shea, nobody  
13 likes to point the finger at another attorney. I don't  
14 like it, but I have an ethical obligation to my client.  
15 The whole case centered around an unfair directed  
16 investigation from an employment defense firm who  
17 specializes, it's right on their website, only  
18 representing management, aggressive employment defense.

19 How can they be involved behind the scene and Mr.  
20 Rigali gives a report and recommendations to the board a  
21 month before he ever meets with Mr. Shea's client, the  
22 plaintiff. They're already talking about recommendations.

23 It doesn't -- with all due respect to Ms. Schrengohst  
24 and her firm, it doesn't get any more whitewash and sham  
25 than that, Judge. That's our defense to this.

1           Once they whitewashed it, they then pushed her right  
2 out the door and the whole time they're investigating my  
3 client's claims, it's being done with Royal working with  
4 Mr. Rigali. You haven't seen half of these e-mails yet  
5 where they're actually giving him instructions to pinpoint  
6 her on her date. Don't let her wiggle out of this.

7           That's not a fair and impartial investigation, and  
8 the board was being CC'd on these e-mails, Judge. The  
9 board that's going to make a decision based on the  
10 recommendations, they're on most of the e-mails. Mr. Shea  
11 never got any. Mr. Shea was never asked for his advice as  
12 to recommendations. Ms. Koss, our client, never knew a  
13 defense firm was behind the board that she was pleading  
14 with to help her. No one ever knew. That's serious. I  
15 don't like it either, but...

16           THE COURT: All right. Ms. Schrengohst, one  
17 last word on that.

18           MS. SCHRENGOHST: With being left out, I feel  
19 it's important to note in this case in this story about  
20 the exchange of a draft prior to Ms. Koss being  
21 interviewed is because Ms. Koss refused initially to meet  
22 with Henry Rigali and instead submitted a -- and perhaps  
23 refused is the wrong word to use, but she decided to  
24 submit instead via her attorney a written statement  
25 instead of meeting him in person and so a report was

1 created at that time. When she later met with him, a  
2 revised report incorporating that was produced.

3 MR. O'CONNELL: That's not true. Mr.  
4 Rigali sent her a letter back in February. "I invite you  
5 to provide me with a written description of events in  
6 advance."

7 THE COURT: I'm going to take this matter under  
8 advisement on the issue of should I conduct a voir dire,  
9 and the primary concern -- one of the primary  
10 considerations is would conducting such a voir dire assist  
11 me in making an important decision, an extremely important  
12 decision regarding the direction the case would go in and  
13 a decision that would significantly impact I think the  
14 defendants' choice of counsel and so that matter is under  
15 advisement.

16 I'll just repeat, Attorney Schrengohst, that at some  
17 point really, really perhaps no matter what day I rule on  
18 the motion I think we need to look into whether or not  
19 your client -- whether or not this issue as a potential  
20 conflict is waivable just to protect the record down the  
21 road.

22 MS. SCHRENGOHOST: Sure.

23 THE COURT: All right. So there we are. We  
24 have our ruling on the one entity issue that you have  
25 seven days to try to show me some authority. Otherwise

1 after we get over that hurdle and that issue of one entity  
2 or two entities is resolved, then after we have a  
3 foundation of what the ruling is going to be we will  
4 discuss -- we'll come back in and discuss some more  
5 details on how far you can go with asking questions about  
6 what they do separately.

7 So let's first see if the judicial notice ruling is  
8 going to stand. I'm going to take it under advisement and  
9 look at again some of what Judge Neiman did.

10 Is there any further materials that I don't have that  
11 would be useful in the review in reexamining this issue?

12 MR. O'CONNELL: Your Honor, a number of  
13 materials were turned over to Judge Neiman. If they're  
14 still with the court, then those would be the materials.

15 THE COURT: So there's no materials other than  
16 what was submitted to Judge Neiman?

17 MR. O'CONNELL: I'm happy to turn them over to  
18 the court.

19 THE COURT: If there's anything that Judge  
20 Neiman didn't have or wasn't submitted, anything like  
21 that?

22 MR. O'CONNELL: It's possible.

23 THE COURT: That may be something you'll want to  
24 think about.

25 MR. O'CONNELL: I'm happy to provide it after

1 showing counsel, I'm happy to provide it, but there are  
2 some records that Attorney Rigali did produce that could  
3 shed light on this.

4 THE COURT: That's what you've been reading  
5 from?

6 MR. O'CONNELL: Yes, sir.

7 THE COURT: What you've been reading from today  
8 is things that Judge Neiman may not have had?

9 MR. O'CONNELL: No, he had all the e-mails I was  
10 referring to, but there's just notes of the investigation,  
11 handwritten notes.

12 THE COURT: Handwritten notes by?

13 MR. O'CONNELL: By Mr. Rigali.

14 THE COURT: Well, to the extent that you think  
15 that that would be helpful.

16 MR. O'CONNELL: Could I have until tomorrow  
17 morning to submit them?

18 THE COURT: Sure. You can submit them. I'm not  
19 going to have a ruling between now and tomorrow morning  
20 for sure. Don't worry about that. All right.

21 So let me look at what those issues are and we'll  
22 schedule -- we'll have you back in court and I will  
23 schedule that. The clerk will notify you when we're back.  
24 It's just going to be after that period of whether or not  
25 you're able to find an opinion supporting your

1 reconsideration because it's likely I'll want to hear you  
2 on that as well. All right. Okay.

3 So the clerk will be in touch with you regarding the  
4 next status after that to see where we are. I might need  
5 some time to look at Judge Neiman's file on the voir dire  
6 issue.

7 I can tell you right now, I don't mind sometimes  
8 tipping my hand just to be fair to the attorneys and your  
9 position, I'm just thinking how could I not do a voir  
10 dire?

11 MR. O'CONNELL: We'll understand whatever  
12 decision the Court makes.

13 THE COURT: So if you're going to submit  
14 anything else, you will have at least a day to do that.

15 MR. O'CONNELL: Okay.

16 THE COURT: Thank you.

17 MR. ARONSON: Thank you, Your Honor.

18 MS. SCHRENGOHST: Thank you.

19 THE CLERK: All rise.

20 **(Court recessed at 3:08.)**  
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22  
23  
24  
25

## C E R T I F I C A T E

I, Alice Moran, RMR, RPR, CSR, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the above-entitled matter.

Date: June 16, 2015

/s/ Alice Moran

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